Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of CTIA Petition for Declaratory Ruling on the Scope of § 47 USC 332(c)(3)(A), in Context of a State of Connecticut CPCN Law.	))))	 DA 11-353 WT Docket No 11-35

Comments in Support of Limited Preemption

Skybridge Spectrum Foundation and supporting commonly-managed LLCs, the undersigned (together, "SSF"), submit these Comments. The subject petition decision will affect SSF.

SSF have pending before the FCC a petition for declaratory ruling on the scope of § 47 USC 332(c)(3)(A) filed Oct. 14, 2009. They also presented a case on this subject to the US Supreme Court in *Havens v. Mobex*, cert. denied.[1] The are presenting a case to the US Supreme Court this week in *Telesaurus v. Radiolink* on this subject.[2]

SSF hold nationwide FCC licenses in 35-40, 217-222, 904-910, and other bands, and support US local, State and federal entities in new forms of needed public-interest wireless for smart transport, energy, environment and emergency systems and applications.[3] In addition, they are active in legal issue of importance to fair and effective wireless in the nation.[4]

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[1] See: http://www.scotusblog.com/2010/08/notable-petitions-26/;

[2] See: http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10a946.htm

[3] See: http://www.scribd.com/warren_havens/shelf; http://www.scribd.com/doc/36614169/Sky-Tel-Atlis-900-200-40-MHz-for-Smart-Transport-Energy-Environment-V3-9-10-Public; http://www.scribd.com/collections/2759618/Skybridge-Smart-Infrastructure-Environment-Wireless-Program-217-222-MHz-902-960-MHz-35-43-MHz;

[4] See: http://www.scribd.com/collections/2340788/FCC-Legal-Defense-of-Spectrum-for-Public-Interest-Wireless-for-Smart-Transport-Energy-Environment

Contents

1. § 332(c)(3)(A) is Overly Vague

"Entry," "rates" and "State regulation" are not defined in the Communications Act or FCC rules. Congress failed to be clear, and these terms narrow common meanings should be accepted by the courts but generally they are not, and the courts are "all over the place." In this situation, a fair conclusion is that §332c3A is overly broad and unconstitutional under the due process clause, U.S. Const. amend. XIV. *Grayned v Rockford,* 408 U.S. 104 (footnotes in original deleted):

> …[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.[5]

The fact that CTIA has to seek FCC clarification here is further evidence of this defect. If, by now, after this statute was passed in the 1996 Telecom Reform Act, the nation's major CMRS operators, via CTIA, don't know what is and what is not preempted, then the solution is to start over in Congress. But this time Congress should assess the current market and technology conditions and enact a statute using defined terms and with clear and limited preemption.

CTIA writes in its petition:

> Finally, Section 332(c)(3)(A)' s ban on entry regulation is categorical and

[5] See also: *United States Telecom Association v. FCC*, 360 U.S. App. D.C. 202, 359 F.3d 554, 576 (D.C. Cir. 2002) holding that the FCC's new impairment standard was overly vague.

prohibits all regulation of entry.

That is not what §332c3A says. That CTIA has to tack on words and emphasis ("ban," "categorical," "prohibits," "all") and plead that the FCC is the only expert oracle that is in the position to know what this statute means, shows this statute is unconstitutionally vague. CTIA still does not say what "entry" is. No one knows what it means. Haven't the CMRS competitors been spotted operating in Connecticut? If so, isn't their further "entry" achieved? The statute does not address re-entry ("can you hear me now," etc.). But Congress did indicate some things it did not mean, indicated below.

2. Market and Technology Directions Show Need for Less Federal Preemption

The assumption behind federal preemption including §332c3A is that a federal scheme without State involvement has net public benefits. That needs to be reassessed as technology and the markets change. In the case of computer and telecom technology and markets (which are increasingly merged) there is a clear trend to more local control and customization. That is seen in the computer industry from old mainframe dominance to current personal computer dominance. As computer technology improves, it supports more localization, customization, speed of adaptation, and independence, and regulation of it should be more local. The federal government is less in touch with the sources of the technology and the markets using its products and services than the States, and as the technology gets more complex, this weighs increasing in favor of less federal regulation and preemption.

The Interstate Commerce Act then the Communications Act were in an era where new technology drove new commerce to mostly interstate levels, but technology now allows more localization and perfection of technology and commerce, and regulation should become more localized to match that.

The 1996 Telecom Reform Act sought to deregulate and make more competitive CMRS in

earlier stages, but overbroad preemption has the opposite affect, increasingly so given the status and direction noted herein.

Big (here, federal) is not always better. Increasingly, technology gives local, down to individual, choices and is more efficient, "green," sustainable, resilient to internal and external attack, etc.

The federal government could save the nation money and stimulate it, in large part by being less in the way of these fast-moving complex matters that it cannot possible keep up with.

CMRS is alive and well in Connecticut. The State and its citizens would not stand for any serious loss or reduction, but if they do, that should be their problem. CTIA has no case to show that the State of Connecticut is not looking to the interest of its citizens or that if it blunders, the citizens cannot do their job to remedy it. If the State regulates to add cost to CMRS, they can presumably add to their charges (but that is not rate regulation, nor is it clear that all regulation is a cost and not ultimately an offsetting benefit).

FCC jurisdiction over CMRS licensing is not at issue, and that is the only clear meaning of "entry."

3. Congressional Intent Shows That §201 Matters Are Not Subject to Preemption

See *Conference Report, H.R. 2264, Omnibus Budget Reconciliation Act of 1993*, August 4, 1993, excerpts in Exhibit 1 below. This shows Congress intent of 47 USC §§ 332(c)(1)(A) and 332(c)(3)(A). Congress determined, as shown in §332c1A that the FCC cannot exempt CMRS from § 201 including:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful:…

§ 201 unjust or unreasonable practices are a basis for §§ 207-207 damage claims (see *Global Crossing,* 550 U.S. 45 (2007)), which can be in US District Court. Some of those

practices are also violations of State law. 47 USC § 414 saves State law claims not specifically under FCC jurisdiction or preemption. Whether in US District Court under § 206-07, or a court under State law tort claims, the effect will be materially same effect upon defendant. It is some effects of court action that some parties argue, when pursued under State law, is State regulation of entry or rates preempted by § 332c3A (court actions under State law being an indirect form of "State regulation" by legal alchemists). The same would apply to direct State regulation. Thus, States can regulate § 201 unjust and unreasonable practices free of § 332c3A preemption.

In sum, State-law tort claims that indirectly regulate, and direct State regulation, that are parallel to permissible federal-law claims noted above are not preempted, see Riegel, Bates, and Lohr,[6] and since § 201 claims are permitted under federal law, they cannot be preempted when they are pled or arise under State law regulation.

SSF-LLCs are discussing this principal here. If the subject Connecticut law has an objective of preventing §201 unjust or unreasonable practices, then this section argues that it cannot be preempted. It seems rational for the State to assert that a law that seeks to assure that access to public rights of way are for important public purposes is one to screen against some forms of unjust and unreasonable practices.

4. States' Public Rights of Way and Eminent Domain Powers Cannot Reasonably be Subject to Federal Preemption, Especially Vague 332c3A Preemption

Public rights of way are often by exercise of eminent domain rights under State powers, or in by direct ownership of public agencies in a State. In either case, States have power to determine just and reasonable vs. unjust and unreasonable use of these rights of way (see section above). It is questionable whether federal preemption can encroach upon these rights, at least if not explicitly intended by Congress and Stated in law, and it is not in §332c3A.

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[6] *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008). *Bates v. Dow Agrosciences LLC* 544 U.S. 431 (2005). Medtronic Inc v Lohr S. Ct 518 U S 470 (1996).

States have eminent domain rights over some federally granted rights including patents,[7] and arguably FCC licenses in some cases. Again, as argued above, § 332c3A preemption of "entry" cannot mean anything that may be related to "entry" regardless of what powers of States and individuals that a CMRS entity or its trade organization may find undesirable.

Congress did not declare or suggest that the FCC, like FERC in some cases, can get into the eminent domain/ right of way business otherwise State matters.

Conclusion

The FCC should either make clear that § 332c3A "entry" means only getting a license from the FCC keeping it in good standing, or it should send it back to Congress as overly vague and unconstitutional, with a suggestion to reassess current wireless technology and markets, and if called for, create a clear replacement law.

[Execution on next page.]

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[7] See, e.g., US Government Accounting Office report GAO-01-811, "Intellectual Property: State Immunity in Infringement Actions":

> Intellectual property—which includes federally granted patents...—is often owned or used by state governmental entities... Until recently, state entities that made unauthorized use of, or "infringed," the intellectual property of others were subject to lawsuits in federal court. In June 1999, however, the U.S. Supreme Court held that states were not subject to such suits, striking down a federal law that would have taken away a state's right to claim immunity under the Eleventh Amendment of the U.S. Constitution when sued in federal court for patent infringement. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), the Court said that the Congress had not shown a pattern of state infringement or an absence of state remedies that would have justified the need for such a law.

Respectfully submitted,

[Filed electronically. Signature on file.]

Skybridge Spectrum Foundation,
Warren Havens, President

Telesaurus Holdings GB LLC,
Warren Havens, President

Environmentel LLC,
Warren Havens, President

Verde Systems LLC,
Warren Havens, President

Intelligent Transportation & Monitoring Wireless LLC,
Warren Havens, President

V2G LLC,
Warren Havens, President

Warren Havens, an Individual

Each Petitioner:
2509 Stuart Street
Berkeley, CA 94705
Phone: 510-841-2220`
Fax: 510-740-3412

April 11, 2011

CONFERENCE REPORT ON H.R. 2264,
OMNIBUS BUDGET RECONCILIATION ACT OF 1993
August 4, 1993

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TITLE VI-COMMUNICATIONS LICENSING AND SPECTRUM ALLOCATION PROVISIONS

"(3) State preemption.-(A) Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services(where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that-

* * * *

section 332(c)(1)

House bill

Section 332(c)(1)(A) states that any person providing commercial mobile service shall be treated as a common carrier subject to the requirements of title II of the communications Act. The Commission is given authority to specify by rule which provisions of title II may not apply. In specifying sections or provisions of sections that shall not apply, the Commission may not specify **sections 201**, 202, or 208. In addition, the Commission may not specify a provision that is necessary to ensure charges are just and reasonable and not unjustly or unreasonably discriminatory, or otherwise in the public interest.

The House bill requires in section 332(c)(1)(B) that the Commission shall order a common carrier to establish interconnection with any person providing commercial mobile service, upon reasonable request. Nothing here shall be construed to expand or limit the Commission's authority under **section 201**, except as this paragraph provides.

Senate amendment

Section 332(c)(1)(A) of the Senate Amendment is the same as the House provision except:

the Senate amendment states expressly that the Commission may waive the requirements of sections 203, 204, 205, and 214, and the 30-day notice requirement of section 309(a):

the Senate amendment specifies that the Commission may not waive sections **201**, 202, 206, 208, 209, 215(c), 216, 217, 220(d) or (e), 223, 225, 22(a), (b), (c), (d), (e), (f), (g), or (i), 227 or 228.

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